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August 19, 2005

Mr. Bill Moore
WA Department of Ecology
Water Quality Program
PO Box 47600
Olympia, WA 98504-7600

RE: Bellevue's Comments - Preliminary Draft NPDES Phase II Stormwater Permit

Dear Mr. Moore:

Bellevue staff appreciates the opportunity to review and comment on a preliminary draft National Pollutant Discharge Elimination System (NPDES) Phase II municipal stormwater permit for Western Washington¹. We consider this preliminary draft permit a starting point in forging an environmentally sound, feasible, small MS4²-focused permit.

As a preliminary draft, this is a staff only review. Policy makers will want to comment on the draft permit which we understand is coming out in October. We look forward to working with Ecology and stakeholders to do this in as short a time as possible. As you know, Bellevue has a pressing interest in securing a permit as quickly as is possible.

This letter identifies the bigger issues identified by staff with the preliminary draft permit. Bellevue has been working with a group of Phase II permittees under the auspices of the Associations of Washington Cities and Counties (AWC) to develop feasible alternatives for the preliminary draft permit to make this program a success.

MONITORING

Preliminary Draft Permit Condition S6 (pg. 9)

The preliminary draft permit requires that the 85 Western Washington Phase II municipalities develop comprehensive stormwater monitoring plans, and do so in a way that demonstrates that Ecology's Stormwater Manual, Best Management Practices, and approaches to stormwater discharges will result in improvements to water quality and overall environment trends in receiving waterbodies. The cost implications of this requirement are enormous, and the expectation of what is to be achieved is simply beyond what is possible, for a number of reasons. There are simply too many variables and factors that affect environmental conditions that are beyond the authority, ability, or responsibility of a municipality to control.

¹ May 16, 2005 Preliminary Draft National Pollutant Discharge Elimination System and State Waste Discharge General Permit for Discharges from Small Municipal Separate Storm Sewers located in Western Washington

² MS4 = municipal separate storm sewer system

Attachment 1, the AWC suggested monitoring approach is an alternative monitoring proposal (including an AWC cover letter) that will result in meeting the goals of the Clean Water Act in an effective manner.

PREDEVELOPMENT FORESTED CONDITION S7C4 (pg. 17-20) & Appendix 1 (pg. 25)

This requirement (derived from 2005 Stormwater Management Manual for Western Washington) requires flow control facilities for sites being developed or redeveloped to mitigate flows to forested predevelopment conditions. In urban and urbanizing environments, this standard is unattainable and raises serious legal concerns. Furthermore, the mitigation requirements outlined in the draft permit would leave jurisdictions very vulnerable to “takings” claims. The exemptions to this requirement (added to the recently revised Ecology Stormwater Manual) have very limited application in urban environments and do not address the takings issues.

Under the auspices of the AWC process described above, a group of Phase II permittees is developing an alternative predeveloped condition proposal that will be submitted at a later date.

AUTHORIZED DISCHARGES – FIRE FIGHTING ACTIVITIES S2C (pg. 5)

The federal Clean Water Act was never intended to regulate life safety activities. The International Fire Code requires testing of sprinkler systems for life safety and property protection and the state mandates fire fighting training exercises.

Revise S2 C. from “This permit authorizes discharges from fire fighting activities, except training exercises, unless the discharges from fire fighting activities are identified as significant sources of pollutants to waters of the State.” to “This permit authorizes all discharges from fire fighting activities including state mandated training and testing of fire protection systems.”

TOTAL MAXIMUM DAILY LOADS (TMDLS) S4 (pg. 6)

Bellevue makes the following request in response to the issues raised in the National Research Council (NRC) of the National Academy of Sciences (NAS) 2001 Assessing the TMDL Approach to Water Quality Management report and as discussed in Attachment 2 (to this letter), the National Association of Flood and Stormwater Management Agencies’ (NAFSMA) TMDL-Program Position Discussion Paper.

Bellevue requests that Ecology, either in the TMDL-development process and/or prior to a municipality being required to implement conditions of an EPA-approved TMDL, conduct a Use Attainability Analysis (UAA) with the support of the affected Phase II municipality to verify that the TMDL is based on science and is in accordance with community values.

COMPLIANCE WITH STANDARDS S5 (pg. 7-9)

This entire section is confusing and as worded appears impossible to administer.

It appears that some of the ambiguous language derives from the proposal to apply the new development, redevelopment and construction site requirements only to those projects that disturb 1 acre or more (referred to as “new stormwater sources”).

For example, both “new stormwater sources” (i.e., ≥ 1 acre disturbance projects) and “new stormwater outfalls”, termed collectively as “new stormwater discharges” are presumed to be in compliance with applicable State Standards (surface water, ground water and sediment management) if the “new stormwater source” or “new stormwater outfall” or both complies with the Permit’s technical standards in Appendix 1 and terms of the permit. There is also a separate definition for “existing stormwater outfalls.” The definition for “new stormwater discharges” is long and confusing and appears to mean that whenever a “new stormwater source” project occurs, then the “existing stormwater outfall” that the “new stormwater source” discharges to becomes a “new stormwater outfall.” This language is confusing.

There is also a clause that if site-specific information indicates that the Permit’s technical standards and permit terms *may not* be sufficient to protect beneficial uses of “waters of the state” from impacts which cause or contribute to loss or impairment, *then* additional controls will be necessary to protect the beneficial uses and these additional controls must be in place prior to the “new stormwater discharge” from the “new stormwater source” or “new stormwater outfall.” This language is also unclear.

At a minimum, staff would suggest the following:

- Revise the part of “new stormwater outfall” definition that reads “A new stormwater outfall does not include replacement of an existing outfall, provided that the replacement does not increase the volume, flow rate, or pollutant load of the discharge...” to “A new stormwater outfall does not include a replacement of an existing outfall, provided that the replacement does not increase volume or pollutant load of the discharge...” The reason for the change is that, as written, it could mean that if one changes the pipe material or size and hence increases the flow rate, then the outfall is new. This interpretation limits a municipalities’ ability to provide relief from localized flooding caused by conveyance capacity constrictions, replace pipe to comply with Washington Department of Fish and Wildlife guidelines, perform common maintenance actions in which a pipe might be replaced with different, better quality pipe material and should not be considered new construction or a “new stormwater outfall.”
- Clarify that complying with the terms of the permit (which include the technical standards) meets the requirement to reduce the discharge of pollutants to the Maximum Extent Practicable (MEP) for the small MS4.
- Eliminate reference to the clause about imposing additional controls if site specific information *indicates or anticipates* impacts to beneficial uses in receiving waterbodies. Impacts to receiving waterbodies are addressed through the federal Clean Water Act Section 303(d) and Total Maximum Daily Load (TMDL) processes.

Perhaps after a discussion of these issues with Ecology, thereby attaining an understanding of goals/intent, Bellevue staff could suggest alternative language and/or other suggested clarifications.

In general, the preliminary draft permit contains too much prescriptive detail on *how* permittee shall comply with the Stormwater Management Program. Examples include:

- Requiring stormwater system maps to be submitted in GIS format following Ecology standards. Some permittees may be unable to provide GIS maps of their systems but may have paper, autoCAD, etc. maps of their systems and these should be acceptable formats. Those municipalities that have GIS (and have their systems in GIS) should not be required to change their municipalities GIS format standards to comply with Ecology's GIS format standards.
- Public outreach must include a multimedia approach. Why? Is there data that shows that a multi-media approach is necessary to do effective public outreach?
- 100% of the target audiences must be reached. Target audiences are those defined and listed in general terms for 4 different public education requirements in the permit. For example, "Provide information to the public, businesses and others promoting the proper management and disposal of toxic materials (e.g., used oil, batteries, vehicle fluids, home chemicals)." This seems so broad and in complying with it (i.e., 100% of "public" for example would mean at a minimum, sending an outreach mailer to all the residents in the municipality), the municipality loses its flexibility in using available resources and opportunities to direct the outreach message to that part of a "target audience" that would result in preventing a higher volume of these toxic materials from being improperly disposed of in the MS4 system, such as known repeat offenders, mobile businesses (carpet and floor cleaners, refueling fleets), auto businesses, etc.

Bellevue suggests that Ecology reconsider the level of Program permit detail and revise the permit conditions to build in local flexibility to meet reasonable goals.

TECHNICAL STANDARDS

S7C4 (pg. 17-20) & Appendix 1 (pg. 25)

There are several issues with the technical standards required in the permit for development, redevelopment and construction sites (including the predevelopment forested condition previously referenced). Below are a few of these issues:

- Ecology's 2005 Stormwater Management Manual for Western Washington is not a regulation. Ecology's policy statement regarding the limitations and proper use of the Manual states that the Manual and "other stormwater technical guidance documents that have been prepared or approved by Ecology" are guidance documents. Bellevue believes there are two issues that the preliminary draft permit needs to correct to be consistent with the policy guiding the proper use of the Manual:
 - ✓ Differentiate between mandatory and guidance sections of the Manual and cite only the mandatory sections of the Manual in the permit (i.e., S7C4 and Appendix 1).
 - ✓ Provide Phase II municipalities with the option of developing a municipality-specific "other stormwater technical guidance document approved by Ecology" or equivalent manual; as Bellevue has done in the past. According to Ecology staff, the preliminary draft permit only allows municipalities to adopt the Ecology Manual or one of the Phase I NPDES municipalities' manuals (if approved by Ecology). The policy clearly states that municipalities will have this option (not just Phase I municipalities).

Bellevue has concerns with other requirements under the technical standards and would welcome the opportunity to discuss these and develop alternatives with Ecology and other stakeholders. One is the enhanced water quality treatment requirement and the options to achieve similar or better environmental results in an urban environment that is primarily undergoing redevelopment.

STORMWATER MANAGEMENT PROGRAM FORMAT

S7c (pg. 11)

Ecology requests comments on the organization of the Stormwater Management Program for Phase I and Phase II Western Washington permits, i.e., “Should the two permits have a consistent organizational structure/outline for the stormwater?” The federal Clean Water Act requirements for Phase I and Phase II permits are different. Therefore, Bellevue thinks the organization of Phase I and Phase II Stormwater Management Programs should be different and consistent with the federal Clean Water Act requirements.

For Phase II Western Washington permits, that would mean that the organization of the Stormwater Management Program is consistent with that of EPA’s NPDES Phase II Rule. In the preliminary draft permit, Ecology combined EPA’s Phase II minimum measures for “Construction Site Stormwater Runoff Control” and “Post-Construction Stormwater Management in New Development and Redevelopment” into one condition, “Controlling Stormwater Runoff from New Development, Redevelopment and Construction Sites.” Bellevue thinks that there is a distinct difference between management/actions regarding construction (clearing and grading, temporary erosion and sedimentation control and control of other construction related pollutants) and that for permanent stormwater facilities (development review, design and inspection) and post-development maintenance of these facilities. Bellevue thinks combining these two measures is confusing and recommends returning to EPA’s Phase II format.

CO-PERMITTEES & SECONDARY PERMITTEES

S1 D.2.A (PG. 3)

Within a multi-jurisdictional MS4 system, each jurisdiction or operator should be responsible for the discharge from their system. The requirement for “other operators of small MS4s” (e.g. schools, water districts, utilities, hospitals, correctional facilities) to apply as a secondary permittee or a co-permittee with the city or county constitutes an unfunded mandate for the permittee to manage these (secondary or co-) permittees.

UNDERGROUND INJECTION CONTROL (UIC)

It appears that stormwater discharges to UIC wells are not covered under this permit. Since the discharges appear to be excluded, is it correct to assume that the MS4 system is excluded from strictures and requirements of the Underground Injection Control Program Rule?

PERMIT TIMELINES AND DEADLINES

There are numerous individual timelines and deadlines for the different permit conditions and Stormwater Management Program Components. Two proposed appendices (Appendix VI – Annual Report Form and Appendix VIII – Summary of Implementation of Schedule) were not

published with the preliminary draft permit. Bellevue believes the numerous individual timelines and deadlines create a time-consuming tracking and permit implementation and administration process for both the permittee and Ecology that is likely to result in permit compliance problems due to misunderstanding, missing one out of numerous deadlines, etc. In addition, Bellevue thinks that some of these timelines and deadlines may not be feasible in terms of completing the necessary municipal administrative processes ; for example, the administrative process timelines for adopting an ordinance.

Bellevue suggests minimizing the number of individual timelines and deadlines (i.e., simplify) as much as possible. It may be possible to (initially) group deadlines that require similar municipal administrative processes.

FISCAL, LIABILITY, AND STAFFING CONCERNS

Bellevue and other Phase II municipalities (under the auspices of the AWC process) expressed concern that Phase II jurisdictions will be paying new permit fees, and yet Ecology will not have staffing in place to properly review the Phase II programs that will be submitted. This leaves cities and counties wondering what we are paying for, and whether there will be the “coverage” that we saw as a central reason to go forward with a Phase II permit requirement in the first place. If standards are too high, and administrative review and protection is haphazard, *our* liability exposure is actually *increased*, rather than *reduced*, as was intended.

Bellevue suggests that a technical peer review group of Phase II stormwater professionals, advisory to Ecology, could be created to assist Ecology with the NPDES Phase II program.

SUMMARY

Overall, the preliminary draft NPDES Phase II permit appears to go well beyond the six mandatory EPA Phase II minimum measures “+ 2” agreement that local jurisdictions, Ecology and other stakeholders agreed to through the advisory committee process in late 2003. It also goes beyond what has been adopted in many other states. We hope to work with Ecology, Phase II municipalities and other stakeholders to forge an environmentally sound, feasible, small MS4-focused permit.

Sincerely,

Damon Diessner
Assistant Director, Environment Division
Bellevue Utilities

Attachments